In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1553

COUNTY OF LOS ANGELES, et al.,

Petitioners,

vs.

VAN DAVIS, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

BRIEF OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, AMICUS CURIAE, IN SUPPORT OF PETITIONERS

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CONSENT OF THE PARTIES

Petitioners and Respondents have consented to the filing of this brief and their letters of consent have been filed with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE

B'nai B'rith, founded in 1843, is the oldest civic service organization of American Jews. The Anti-Defamation League was organized in 1913 as a section of B'nai B'rith to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States. The Anti-Defamation League is vitally interested in protecting the civil rights of all persons, be they

minority or majority, and in assuring that every individual receives equal treatment under law regardless of his or her race or religion.

Among its many other activities directed to these ends, the Anti-Defamation League has in the past filed *amicus* briefs in this Court urging the unconstitutionality or illegality of racially discriminatory laws or practices in such cases as, *e.g.*, *Shelley* v. *Kraemer*, 334 U.S. 1 (1948); *Sweatt* v. *Painter*, 339 U.S. 629 (1950); *Brown* v. *Board of Education*, 347 U.S. 483 (1954); *Colorado Anti-Discrimination Commission* v. *Continental Airlines, Inc.*, 372 U.S. 714 (1963); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Sullivan* v. *Little Hunting Park*, 396 U.S. 229 (1969); *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1 (1973); *De Funis* v. *Odegaard*, 416 U.S. 312 (1974); *Runyon* v. *McCrary*, 427 U.S. 160 (1976); *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976); *Regents* v. *Bakke*, 98 S. Ct. 2733 (1978).

Statement of the Case

In January, 1973, when this case was filed, the workforce of the Los Angeles County Fire Department was 0.5% black and 2.8% Mexican-American, although the population of the County was 10.8% black and 18.3% Mexican-American. (R. 160.) From 1968 to 1972 (the only years for which data was included in the record), the Department was hiring new firemen at the rate of approximately 100 each year; in 1968 it had 683 applicants for these positions, in 1969 it had 1,424 applicants and in 1972, 2,414 applicants. (R. 138, 140.)

In 1968 and 1969 written tests were used in ranking applicants. Although the district court found that defendants did not have "a willful or conscious purpose of excluding blacks and Mexican-Americans from employment," it did conclude that these tests had a disproportionately adverse effect upon black and Mexican-American applicants. (R. 160, 162.)

In 1972 the Department eliminated the use of the written test as a selection device, and substituted a procedure in which a written test was to be used only to screen out illiterates. Because 97% of the 2,414 applicants passed the 1972

test, the Department decided to choose at random 500 of those who had passed for interviews and physical agility tests. The results of those interviews and physical tests were then to be used to construct a ranked eligibility list. However, before the Department selected the 500 candidates, a state court temporarily enjoined the random selection pending determination of whether it violated a California Code provision requiring merit selection.

In early January, 1973* the Department, not having formulated an eligibility list for several years, decided to interview applicants who had scored in the top 544 places on the 1972 test. Shortly thereafter, however, the Department abandoned this idea and instead interviewed all applicants who had passed the test. Later in 1973, as a result of those interviews, a hiring list was certified. Plaintiffs have stipulated that that hiring list did *not* have a disproportionate impact on black and Mexican-American applicants. R. 140-141; *Davis* v. *County of Los Angeles*, 566 F.2d 1334, 1346 (9th Cir. 1977).

On January 11, 1973, plaintiffs, who are blacks or Mexican-Americans who had applied for employment as firemen in 1971 and taken the 1972 written test, filed this suit on behalf of a class consisting of all current and future black and Mexican-American applicants for employment as firemen,** (R. 62) alleging that the Department had engaged in racially discriminatory hiring practices in violation of the Fourteenth Amendment, 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq*.

The district court found in favor of the plaintiffs, holding that the Department had violated Title VII (which had become applicable to it in March 1972) and § 1981 by (1) using written tests as a selection device prior to learning that the present suit was about to be filed, and (2) failing to take the necessary

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* The January 1972 date in the stipulation in the record (R. 141) is apparently a typographical error, inasmuch as the test was not given until January 1972 (¶ 6 of the complaint).

** The class also included blacks and Mexican-Americans who were already employees of the Department. These plaintiffs originally challenged the lawfulness of defendants' promotion practices as well. That claim was later abandoned, however, by stipulation of the parties. (R. 134.)

steps to dispel its reputation in the black and Mexican-American communities as an employer who discriminated against those groups. (R. 160.) However, the district court also found that the Department had not interfered with individual affirmative action efforts by certain of its officials to recruit larger numbers of black and Mexican-American applicants and, further, that neither the Department nor its officials had engaged in the foregoing unlawful practices "with a willful or conscious purpose of excluding blacks and Mexican-Americans from employment." (R. 160, 162.) The court also found the Department's minimum height standard of 5'7", challenged as having a disparate impact on Mexican-American applicants, to be job-related. (R. 160.)

In its findings of fact the court stated that the defendants had failed to "justify" the disparity between the numbers of minority workers it employed and the numbers in the population. The court therefore concluded that the racial imbalance in defendants' workforce was an "effect" of past discrimination. Citing the principle that a court of equity has a duty to eliminate the "present effects of past discrimination," the court decreed that of the firemen hired each year, 20% must be black and 20% Mexican-American until the racial percentages in the workforce were equal to the percentages of blacks and Mexican-Americans in the general population of Los Angeles County. (R. 160, 164, 166.) The record indicates that, at current hiring rates, it will take approximately ten more years to meet this goal for blacks and twenty more years for Mexican-Americans.*

Defendants appealed the entire judgment of the district court; plaintiffs appealed only those aspects of the judgment upholding the minimum height requirements.

The court of appeals affirmed the district court's finding that, notwithstanding the absence of a racially discriminatory

* Footnote 3 of the court of appeals' opinion, 566 F.2d at 1336, erroneously sets forth much shorter time spans, but they are in fact based upon an assumed 1-1-1 hiring ratio. Plaintiffs themselves pointed this out on page 36 of their brief on rehearing, where they noted that it would take until 1987 for blacks and until 2001 for Mexican-Americans to reach parity if the Department hired one-third minorities each year.

purpose, the Department's proposed, but abandoned, use of the 1972 written test as a ranking device violated Title VII and § 1981 (Judge Wallace dissenting as to § 1981); the court of appeals, however, rejected the district court's finding that the use of the 1969 test constituted actionable discrimination, holding that the plaintiff class, which did not include unsuccessful applicants from that year, "lacked standing to challenge defendants' prior use of [that] test." 566 F.2d at 1338. The court of appeals affirmed (Judge Wallace dissenting) the quota remedy, but remanded the case for consideration of raising the Mexican-American quota in light of its holding that the 5'7" height limitation was unlawful. 566 F.2d at 1343.

QUESTION ADDRESSED

This brief will limit itself to the racial hiring quota issue. However, if this Court decides that a constitutional standard of liability applies to § 1981, there will be no need to decide the lawfulness of the racial quota relief in this case, inasmuch as the district court found that defendants did not at any time have a purposeful intent to discriminate against black and Mexican-American job applicants.

ARGUMENT

THE RACIAL QUOTA IN THIS CASE VIOLATES THE PRINCIPLES WHICH LIMIT THE POWER OF THE DISTRICT COURT TO GRANT RELIEF.

In recent years this Court has, on several occasions, discussed the standards to be followed by district courts in fashioning equitable decrees to grant relief from actionable race discrimination in employment. In such cases the Court has consistently held that every effort should be made to put identifiable victims of discrimination in the position they would have been in but for the discrimination. See *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975); *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 772-73 (1976). However, this Court has also recognized that a member of a minority group that has been discriminated against does not automatically qualify as a "victim of discrimination" simply by virtue of his race. Rather, in *Teamsters* v. *United States*, 431 U.S. 324, 363-64 (1977), the Court emphasized that each individual requesting relief must prove that he or she has actually suffered discrimination.

This Court has also emphasized that, in framing an equitable decree, the district court must "tailor 'the scope of the remedy' to fit 'the nature and extent of the . . . violation' " proved, *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 420 (1977). When the disparity between the violation found and the relief granted becomes too great, the district court's order must be reversed, as it was in *Dayton*. *Id.* at 419.

Furthermore, in considering what constitutes proper relief, the district court has an obligation to determine whether the legitimate expectations of innocent third parties would be imperiled by its proposed decree. If so, the court must undertake the delicate task of balancing the interests at stake. For, as this Court stated in *Teamsters* v. *United States*, *supra*, 431 U.S. at 375:

> "[W]hen immediate implementation of an equitable remedy threatens to impinge upon the expectations of innocent parties, the courts must 'look to the practical realities and necessities inescapably involved in reconciling competing interests,' in order to determine the 'special blend of what is necessary, what is fair, and what is workable.' *Lemon* v. *Kurtzman*, 411 U.S. 192, 200-201 (opinion of Burger, C.J.)."

Unfortunately, the lower courts in the case at bar appear to have ignored these fundamental principles. Instead of tailoring the decree to the at best *de minimis* violations proved, the courts imposed a drastic quota remedy that will encumber defendants' hiring decisions for many years to come. In so doing, the courts were not attempting to remedy injuries actually inflicted on individual members of the plaintiff class; plaintiffs conceded that no such injuries existed. Rather, the courts were apparently attempting to remedy the injuries suffered by an entire race of people over a long period of time.

We submit that such a result violates not only settled principles governing a court's equitable powers but also fundamental concepts of standing, limitations, due process and equal protection.

A. The Court Failed to Tailor the Remedy to the Limited Nature of the Violation.

The courts below found that defendants had engaged in two employment practices which, because of their disproportionate impact on blacks and Mexican-Americans, violated Title VII and § 1981: (i) the intent—never carried out—to use scores on the 1972 written test to rank job applicants and (ii) the enforcement of a 5'7" minimum height limitation.

In paragraph 9 of their second amended complaint, plaintiffs conceded that the 1973 hiring list compiled by the Department

> "did not have a disproportionate detrimental impact upon black and Mexican-American applicants. Due to the change in selection procedures, a substantial number of minorities have been placed at or near the top of the eligibility list of current applicants for hire as Los Angeles County firemen, with the result that, subject to medical examinations now being carried out, it is antici-

pated that *there will be approximately thirty-three minority persons among the first class of inductees which will total sixty persons*." (R. 16.) (Emphasis added.)

Because of this lack of disparate impact, plaintiffs conceded before the court of appeals that the "post-March 1972 discrimination, challenged under Title VII and Section 1981, had no 'effects.' " Plaintiffs' Brief on Rehearing at 1.

From the foregoing it is clear that no relationship has been shown, or even claimed, between the uneffectuated intent to use the 1972 written test as a selection device and the drastic remedy of a racial hiring quota. The height limitation is also clearly not relevant to the quota.

The only other violation found in this case was the Department's "failure and refusal to take necessary affirmative steps" to overcome the Department's reputation of discriminating against blacks and Mexican-Americans. The district court held that this was an independent violation of § 1981 and Title VII. The court of appeals did not rule on this question, although it relied on the district court's finding to support the quota remedy.

We think it is clear that the mere failure to take affirmative steps cannot be an independent violation of either § 1981 or Title VII, inasmuch as neither statute by its terms requires such affirmative steps. However, we do not dispute the court of appeals' assumption that a bad reputation in the community, although not actionable as such, may be an effect of past discrimination that will have a continuing impact on the employment opportunities of minorities in the future. As this Court noted in *Teamsters* v. *United States*, *supra*, 431 U.S. at 365-66, the effect of such a reputation may well be to discourage minorities from even applying for work. But the appropriately tailored relief for such a condition surely is not a racial hiring quota.

A similar problem was faced in *Franks* v. *Bowman Transportation Co.*, 495 F.2d 398 (5th Cir. 1974), *rev'd on other grounds*, 424 U.S. 747 (1976), where the employer's practice of relying on "word of mouth" recruiting was found to have perpetuated the past discrimination which had created an all-white workforce.* In that case the court of appeals required the district court to impose a "recruitment remedy" that would compel the employer to take affirmative steps, such as placing advertisements for job openings and notifying employment agencies, to increase the number of minority applicants.**

Assuming that a defendant cooperates with the court's decree in good faith, this type of remedy should be sufficient to erase not only the reputation problem but the racial imbalance as well. For, if the chilling effect of past discrimination is dissipated through a recruiting campaign and if new job applicants are accorded an equal opportunity to compete for job openings, it is reasonable to assume that over a period of time the racial imbalance will be adjusted without the interference of a court:

> " . . . it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired." *Teamsters* v. *United States*, *supra*, 431 U.S. at 340 n. 20.

There is no reason to believe that a recruiting remedy would not have been successful in this case. As we noted above, the district court found that defendants were not guilty of purposeful discrimination. Moreover, the court found that "several of Defendants' officials [had] engaged in efforts designed to increase the minority representation in the . . . Department," without interference from the Department. Finally, the Department's performance in the years since the hiring quota was imposed, in hiring 55% minorities rather than the

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* The court in that case described the problem as follows:

> "[W]hen all current employees in a unit are white 'word-of-mouth hiring alone would tend to isolate blacks from the "web of information" which flows around opportunities at the company.' Although this recruiting method is racially neutral in form, in practice it operates as a 'built-in headwind' to blacks." 495 F.2d at 419.

** In *Teamsters* v. *United States*, *supra*, 431 U.S. at 365 n. 51, this Court specifically approved of this type of remedy to dispel more subtle forms of continuing discrimination.

40% required by the decree, is strong evidence that it would have cooperated fully to ensure equal opportunity for minority applicants in the future.

B. The Plaintiff Class Did Not Contain Identifiable Victims with Live Claims of Discrimination.

The courts below sought to justify the imposition of a racial hiring quota on the ground that it was necessary to remedy an "effect" of past discrimination: *viz.*, the racial imbalance in the Department's work force. In their brief in opposition to the petition for certiorari, plaintiffs attempt to support this reasoning, arguing that the defendants had been guilty of a "pattern and practice of discriminatory practices that were unlawful . . . under § 1981." Brief at 29.

Neither the courts below nor the plaintiffs have ever argued that this past, allegedly illegal conduct had an impact on the rights of individual class members. Indeed, it is clear that the events constituting the alleged past discrimination must have occurred before any of the current plaintiffs (who are all either 1971 or future applicants) applied for jobs with the Department. Plaintiffs concede that no discriminatory acts occurred after March, 1972, when Title VII became applicable to the Department. As noted above, they stipulated that the 1971 applicants were not discriminated against in the formulation of the 1973 hiring list.

It is also clear that the "past discrimination" must have occurred prior to the cut-off date for § 1981 claims under the applicable three-year statute of limitations.* The only "violation" even arguably committed after January, 1970 would have been the continued use of a hiring list based on the 1969 written test.** The court of appeals found that, because the plaintiff class did not include unsuccessful applicants from

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* The statute of limitations for actions under § 1981 is borrowed from the applicable state statute. *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 462 (1975). The Ninth Circuit has held that under California law a three-year statute of limitations applies to § 1981 claims. *Mills* v. *Small*, 446 F.2d 249 (9th Cir.), *cert. denied*, 404 U.S. 991 (1971).

** It is unclear from the record whether there was any hiring in this period.

1969, the class did not have standing to complain about the use of that test. 566 F.2d at 1337-38. But even if plaintiffs *had* included unsuccessful 1969 applicants in their class description, it is clear that the 1969 test did not create all, or even a significant part of, the racial imbalance that the quota was designed to remedy.

On the face of it, plaintiffs' claim is defective in two respects: *first*, because no member of the plaintiff class was injured by the past discrimination, or will be injured in the future by it, the class would seem to be without standing to sue to redress the alleged violations, and *second*, because the acts in question were committed prior to the effective date of Title VII and outside the applicable statute of limitations under § 1981, claims based thereon would seem to be time-barred. Plaintiffs, however, argue that they are not bound by the ordinary concepts of standing or statutes of limitation. They arrive at this extraordinary conclusion by asserting that they are acting as "private attorneys general," who are suing to redress an injury to the public interest rather than a wrong done to them individually.

Plaintiffs' argument assumes that a class of individuals has standing to sue to redress injuries inflicted on other individuals, simply because the plaintiff class and the victims share a common racial or ethnic heritage. This Court, however, has never excused private parties from the requirement of establishing injuries to their own legally cognizable rights. See, *e.g.*, *Warth* v. *Selden*, 422 U.S. 490, 499 (1975): "[E]ven when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."

Moreover, in pattern and practice cases, such as *Teamsters*, and class actions, such as *Franks*, this Court has always paid close attention to the requirement that each person who asserts a claim for relief must prove that he or she was actually a victim of discrimination. A racial hiring quota ignores the need for such individualized compensation in favor

of wholesale "relief" to anyone who happens to be a member of the allegedly disfavored group.

Such an approach is fundamentally inconsistent with the individual character of the rights guaranteed by § 1981. Section 1981 says nothing about the rights of one racial group as against another. Rather, it seeks to ensure that "*all persons*" have an opportunity to enter into contracts, regardless of the color of their skin. See *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976).*

Furthermore, by deflecting concern away from the individual, the approach urged by plaintiffs would inevitably cause the courts to become less interested in preserving the "equality of employment opportunities" guaranteed by the civil rights laws, *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430 (1971), and more interested in maintaining racial balance. As this Court has recently held, however, an individual's equal opportunity rights may not be affected by the racial composition of the workforce he is seeking to join:

> "It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force." (Emphasis in original.)

Furnco Construction Corp. v. *Waters*, 98 S. Ct. 2943, 2951 (1978). Any other result would raise the type of concerns voiced by Mr. Justice Powell in *Regents* v. *Bakke*, 98 S. Ct. 2733, 2752 (1978). As he noted, preferences for a particular group may in turn lead to the need for other preferences: for, as preferences "have their desired effect and the consequences of past discrimination [are] undone, new judicial rankings would be necessary."

Plaintiffs also argue that their status as "private attorneys general" exempts their claims from the statute of limitations.

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* As Mr. Justice Stevens stated in *Los Angeles* v. *Manhart*, 98 S. Ct. 1370, 1375 (1978), in construing similar language in Title VII: "The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual or national class."

In support of this argument plaintiffs cite three court of appeals cases* holding that "pattern and practice" suits brought by the EEOC under Title VII are not barred by a state statute of limitations, because the statute does not apply to suits brought on behalf of the sovereign. In *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355 (1977), this Court agreed with the lower courts that the EEOC is not subject to a state statute of limitations in such suits. But it did not base its decision on the EEOC's status as a representative of the public interest. Rather, the Court found support for its decision in the legislative history of the amendment extending the power to sue to the EEOC and in the procedural protections afforded potential defendants by the EEOC's notice procedures.

There is no comparable legislative history to indicate that plaintiffs in this case should be similarly exempted from the ordinary limitations rules; nor were defendants in this case protected from stale claims by any type of notice procedures comparable to those employed by the EEOC. Moreover, there are clear policy reasons for not allowing a plaintiff to circumvent the statute of limitations in order to accelerate the elimination of a racial imbalance that resulted from a history of discrimination.

Under Title VII a court is prohibited from imposing a quota for the sole purpose of curing a racial imbalance resulting from pre-Act discrimination. The legislative history of Title VII indicates that its effect was to be prospective only. As an interpretive memorandum placed in the record by the sponsors of the bill stated:

> "if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged—or indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to

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* *EEOC* v. *Occidental Life Ins. Co.*, 535 F.2d 533, 537-40 (9th Cir. 1976), *aff'd*, 432 U.S. 355 (1977); *EEOC* v. *Griffin Wheel*, 511 F.2d 456, 458-59 (5th Cir. 1975); *EEOC* v. *Kimberly Clark Corp.*, 511 F.2d 1352, 1359-60 (6th Cir. 1975). See Plaintiff's Brief in Opposition to the Petition for Certiorari at 30.

give them special seniority rights at the expense of the white workers hired earlier." 110 Cong. Rec. 7213 (1964).

See also *Teamsters* v. *United States, supra,* 431 U.S. at 356-57, where this Court held that "Those employees who suffered only pre-Act discrimination are not entitled to relief, and no person may be given retroactive seniority to a date earlier than the effective date of the Act."

The same principle applies to a racial imbalance in the workforce of a public employer that had discriminated prior to March 1972 when Title VII first became applicable to it:

> "A public employer who from [the Act's effective date] forward made all its employment decisions in a wholly nondiscriminatory way would not violate Title VII even if it had formerly maintained an all-white work force by *purposefully* excluding Negroes." (Emphasis added.) *Hazelwood School Dist.* v. *United States,* 433 U.S. 299, 309 (1977).

In a footnote to *Hazelwood, id.* at 309 n. 15, the Court pointed out that the school district had been subject to the commands of the Fourteenth Amendment during the entire period when the past discrimination had occurred. Yet the Court held that, even if the school district had violated the Constitution, the pre-Act conduct could not be remedied under Title VII.

A racial imbalance caused by unlawful acts committed outside the the applicable statute of limitations under § 1981 should be treated in the same way that a racial imbalance resulting from pre-Act discrimination is treated for Title VII purposes. As this Court stated in *United Air Lines, Inc.* v. *Evans,* 431 U.S. 553, 558 (1977):

> "A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences."

To uphold the imposition of a racial hiring quota in this case, where its sole purpose is to erase an historically caused racial

imbalance, would be to reach back into the past to remedy a series of "unfortunate event[s]"* which should not have "present legal consequences."

C. The Racial Quota Fails to Consider the Interests of Innocent Third Parties.

If there had been identifiable victims of actionable discrimination in this case, the district court would have been required under this Court's decisions in *Teamsters* v. *United States, supra,* 431 U.S. 324, and *Franks* v. *Bowman Transportation Co., supra,* 424 U.S. 747, to undertake the "delicate task of adjusting the remedial interests of discriminatees and the legitimate expectations" of other persons "innocent of any wrongdoing." *Teamsters* v. *United States,* 431 U.S. at 372. The district court failed even to recognize that it had this responsibility, and instead imposed a drastic quota remedy without discussion.

Where there is a close connection between an actionable injury to an identifiable victim and the relief proposed, a court may be justified in ultimately concluding that the need to compensate the victims outweighs the legitimate expectations of innocent white workers and applicants. But where the connection is as attenuated as it is in this case, the expectations of innocent individuals must take priority. As Mr. Justice Powell recognized in *Bakke*:

> "*All* state-imposed classifications that rearrange burdens and benefits on the basis of race are likely to be viewed with deep resentment by the individuals burdened. The denial to innocent persons of equal rights and opportunities may outrage those so deprived and therefore may be perceived as invidious. These individuals are likely to find little comfort in the notion that the deprivation they are asked to endure is merely the price of membership in the dominant majority and that its imposition is inspired by the supposedly benign purpose of aiding others." (Emphasis in original.) 98 S. Ct. at 2751 n. 34.

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* In this case there was no proof of any past instances of discrimination. The district court, however, presumed from the racial imbalance itself that there must have been such discrimination.

If the quota is upheld in this case, for the next ten years white applicants for the position of a fire-fighter in the Los Angeles County Fire Department will be denied the opportunity to compete for 40% of the available positions, solely on account of their race. Surely such a drastic curtailment of the equal opportunity rights of innocent individuals who happen to be white* cannot be justified in the absence of a showing that it is necessary to protect the rights of identifiable victims.

D. The Quota Violates Equal Protection and Due Process Principles.

Although this Court need not reach constitutional due process and equal protection principles in order to set aside the decree, we submit that the racial quota violates those principles as well. As Mr. Justice Powell stated in *Bakke*:

> "It suffices to say that '[o]ver the years, this Court consistently repudiated "[d]istinctions between citizens solely because of their ancestry" as being "odious to a free people whose institutions are founded upon the doctrine of equality." ' *Loving* v. *Virginia*, 388 U.S. 1, 11 . . . quoting *Hirabayashi*, 320 U.S., at 100." 98 S. Ct. at 2750.
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> * * * *
>
> "This Court has not sustained a racial classification since the wartime cases of *Korematsu* v. *United States*, 323 U.S. 214 . . . and *Hirabayashi* v. *United States*, 320 U.S. 81 . . . involving curfews and relocations imposed upon Japanese-Americans." 98 S. Ct. at 2752 n. 37.

This is certainly not the case in which the Court should embark upon a new course of constitutional law which would have the effect of resurrecting pernicious doctrines under which the Government, and in particular the judiciary, is allowed to classify people solely on the basis of their race.

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* It is clear that § 1981—the only statute under which plaintiffs seek to justify the quota—is an equal protection statute intended to protect white persons, as well as members of minority groups. *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976).

CONCLUSION

The racial quota hiring decree has no valid basis in law or public policy. To the extent that the lower federal courts have imposed such remedies, they are out of step with the decisions of this Court and the requirements of our legal system. The judgment below, to the extent it imposed a racial hiring quota, should be reversed.

Respectfully submitted,

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